In The

Supreme Court of the United States

MIGUEL ANGEL RAMOS,

Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General of the United States,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETTION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

An alien whose drug offense is expunged pursuant to 18 U.S.C. § 3607, the Federal First Offender Act, will not be removed from the United States. An alien who meets the requirements of 18 U.S.C. § 3607 but has his drug offense expunged pursuant to state law will be removed from the United States. In the decision below, the Seventh Circuit held such an inconsistency does not violate equal protection. The Ninth Circuit held this inconsistency impinges equal protection principles. This conflict has created a situation whereby the life altering event of removal turns on the vagaries of geography. The question presented is:

> Whether Mr. Ramos' equal protection rights were violated because his removal was based solely on the fortuity his conviction was expunged under state law rather than federal law.

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PETITION FOR A WRIT OF CERTIORARI

Miguel Angel Ramos respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported at 414 F.3d 800 and is set forth in the Appendix ("App.") at 1. The Board of Immigration Appeals' decision (App. 12) is unreported. The Immigration Judge's oral opinion (App. 15) is also unreported.

STATEMENT OF JURISDICTION

The Seventh Circuit filed its decision on July 12, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes include 18 U.S.C. § 3607, the Federal First Offender Act, 8 U.S.C. § 1101(a)(48)(A), the Illegal Immigration Reform and Immigrant Responsibility Act, and Neb. Rev. Stat. § 29-2264(2). The constitutional provision implicated is the Fifth Amendment.

STATEMENT OF THE CASE

Miguel Angel Ramos is a twenty-nine-year-old native and citizen of Mexico who resided in the United States for over eleven years. Mr. Ramos had an I-130 family petition approved for his benefit on August 17, 1992. App. 28. Mr. Ramos has a wife and child, both United States citizens. App. 29. While Mr. Ramos is in Mexico upon his removal from the United States following the decision of the Board of Immigration Appeals ("BIA"), his wife and child reside in Nebraska.

The events culminating in Mr. Ramos' removal began on August 22, 2000, when he was convicted for attempted possession of a controlled substance in violation of Neb. Rev. Stat. §§ 28-201 and 28-416 in the County Court of Hall County, Nebraska. App. 2. Mr. Ramos pleaded *nolo contendere*. App. 3. His sentence consisted of a $500 fine plus court costs and witness fees, with no incarceration or probation. App. 3.

On January 24, 2003, Mr. Ramos appeared for an adjustment of status interview in Omaha, Nebraska. App. 3. At that point, he was arrested, placed in custody, and served with a Notice to Appear. App. 3. The Notice to Appear alleged that as a result of his violation of Neb. Rev. Stat. §§ 28-201 and 28-416, Mr. Ramos was subject to removal from the United States based on 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(2)(A)(i)(II). App. 3.

Mr. Ramos filed a motion to set aside his drug conviction. On March 18, 2003, the Hall County Court sustained his motion to set aside his conviction, pursuant to Neb. Rev. Stat. § 29-2264. App. 19. Section 29-2264(2) enables individuals convicted of a misdemeanor to petition the sentencing court to set aside the conviction. The court

noted all civil disabilities and disqualifications imposed as a result of the conviction were removed. App. 19.

Removal proceedings began on March 24, 2003 with Immigration Judge James R. Fujimoto ("IJ") presiding. App. 4. Mr. Ramos contended his conviction was expunged and therefore he was not removable. The IJ found otherwise. The IJ relied on *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), for the proposition that "no effect is to be given in Immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation [sic] by a state rehabilitative statute." App. 16. The IJ ruled the conviction final for immigration purposes and ordered Mr. Ramos' removal. App. 18.

Mr. Ramos appealed to the BIA. During that time, the Nebraska State Court reissued Mr. Ramos' earlier expungement order. App. 26. In the June 18, 2003 order, the court clarified: "since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes § 29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation." App. 26.

The BIA affirmed the IJ on October 24, 2003. App. 12. The BIA agreed that the Nebraska law under which Mr. Ramos' conviction was set aside was a rehabilitative statute and, consequently, his conviction was final for immigration purposes. App. 13-14. The BIA was silent on the equal protection issue.

Mr. Ramos appealed to the Seventh Circuit, arguing an equal protection violation. He asserted that when

Congress defined "conviction" in 8 U.S.C. § 1101(a)(48)(A), it did not repeal 18 U.S.C. § 3607, the Federal First Offender Act (FFOA). A conviction under the FFOA would be expunged for immigration purposes. However, Mr. Ramos' conviction, which met the requirements of the FFOA, was expunged pursuant to state law and therefore was not recognized for immigration purposes. Mr. Ramos asked the Seventh Circuit to find this inconsistent treatment contrary to equal protection of the laws, relying on the Ninth Circuit's decision in *Lujan-Armendariz* v. *INS.*, 222 F.3d 728 (9th Cir. 2000), which found an equal protection violation. The Ninth Circuit saw "no rational basis for a federal statute that treats persons adjudged guilty of a drug offense under state law more harshly than persons adjudged guilty of the identical offense under federal law, [thus] the petitioners [could] not be deported for their first-time simple drug possession offenses." *Lujan-Armendariz*, 222 F.3d at 749.

In the decision below, the Seventh Circuit, in direct conflict with the Ninth Circuit, found no equal protection violation. App. 10-11. It determined that "the BIA (as well as Congress) reasonably might have thought that the law should entitle only persons who actually have been charged and sentenced under the FFOA to leniency for immigration purposes." App. 11. The Seventh Circuit relied on an earlier decision, *Gill* v. *Ashcroft*, 335 F.3d 574 (7th Cir. 2003). App. 10. In *Gill*, the Seventh Circuit determined a petitioner's expunged conviction was final for immigration purposes because "expungements (or restorations of civil rights) under state law do not negate a 'conviction' for purposes of immigration law." *Gill*, 335 F.3d at 577. The Seventh Circuit took *Gill* one step further,

finding recognition of federal but not state expungements was consistent with equal protection principles. App. 11.

The decision below rejected the Ninth Circuit's approach in *Lujan-Armendariz* by simply invoking *Gill*. However, a cursory review of *Gill* reveals the Seventh Circuit's true interpretation of *Lujan-Armendariz*: "[t]he holding of *Lujan-Armendariz*, which elevates an abandoned administrative practice over a statutory text, is untenable, and we decline to follow it." *Gill*, 335 F.3d at 579. The Seventh Circuit further noted that "[d]epriving a statute of any consequence is serious business, which *Lujan-Armendariz* did not adequately justify." *Id.* at 578. Finally, the *Gill* Court, and the *Ramos* Court by its reliance on *Gill*, acknowledged "this decision creates a conflict among the circuits." *Id.* at 579.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Deepened An Existing Split As To Whether The Benefits Of 18 U.S.C. § 3607 Should Be Extended To Aliens Whose Offenses Are Expunged Under State Rehabilitative Laws.

The Seventh Circuit's decision has added to the division of legal authority on the question presented for which conflicting interpretations of Constitutional law exist. On the one hand, the established law of the Ninth Circuit is that a petitioner's expunged state narcotics conviction cannot be the predicate for a removal order because he was eligible for amelioration under the FFOA. *Lujan-Armendariz*, 222 F.3d at 749. On the other hand, the Third, Fifth, Seventh, and Eleventh Circuits have

considered the identical issue and reached a contradictory position. See, Part I, Section B, infra. The conflict among the circuits is ripe for resolution. This case presents an opportunity for the Court to settle the split while simultaneously resolving an important question of Constitutional law.

Leaving this intolerable conflict unresolved has significant ramifications for aliens throughout the country. Mr. Ramos would be with his wife and child had his offense occurred within the Ninth Circuit. Instead, he is in Mexico. Such a disjointed state of law cannot persist, especially when the human costs are so profound. The devastating consequences of removal should not turn on the fact an alien was in a circuit which did not recognize state expungements. This Court should grant certiorari for the purpose of establishing a nationally uniform understanding of whether equal protection requires the benefits of the FFOA extend to aliens whose drug convictions are expunged under state law.

As the law currently stands, a conviction under the FFOA, for which Mr. Ramos satisfies the requirements of, would be expunged for immigration purposes. However, the exact same conviction expunged pursuant to a state statute is the impetus for removal. This stark contrast of outcomes is difficult to justify and necessitates review. Mr. Ramos is being removed solely because of the arbitrary and fortuitous circumstance that his conviction was expunged under state law. This inequity is inconsistent with the equal protection guarantees embedded in the due process clause of the Fifth Amendment and the requirement that "all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). It further flies in the face of the BIA

and courts' strong penchant for treating first-time alien drug offenders in a uniform fashion.

A. The Evolution of Laws Relating to Aliens' Expunged Drug Convi tions: With An Eye Towards Uniformity.

In 1970, Congress enacted the FFOA, a rehabilitative statute enabling first-time drug offenders found guilty of simple drug possession to have the charges dismissed without entry of a conviction. 18 U.S.C. § 3607(a) An offense disposed of under its provisions "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(b).

After the FFOA's enactment, the BIA held a drug offense expunged under the FFOA (or any state counterpart to the FFOA) was not a conviction for immigration purposes. *Matter of Werk*, 16 I. & N. Dec. 234, 235-36 (BIA 1977). The BIA expanded the rule to include state rehabilitative laws that were not precise counterparts to the FFOA. *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995). The BIA, "[i]n the interest of uniform and fair application of the immigration laws," held a petitioner would avoid removal by showing FFOA eligibility had he been prosecuted under federal law. *Id.* at 64. The BIA reasoned that leniency "should be extended equally to any alien drug offender who could have obtained the same treatment under federal law if he had been subject to federal rather than state prosecution." *Id.* at 63.

In 1996, Congress enacted 8 U.S.C. § 1101(a)(48)(A) as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Section 1101(a)(48)(A)

requires, for purposes of removal, only a formal judgment of guilt entered by a court and some form of punishment, penalty, or restraint on the alien's liberty. In enacting § 1101(a)(48)(A), Congress was silent on the provisions of the FFOA and the effect of expungements.

In *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999), the BIA considered the effect of § 1101(a)(48)(A). The BIA concluded that under the statutory definition of "conviction" as provided in § 1101(a)(48)(A), no effect was to be given in immigration proceedings to a state action which purported to expunge, vacate, or otherwise remove a record of guilt or conviction via a state rehabilitative statute. *Id.* at 522-23.

On appeal, the Ninth Circuit set aside the decision. *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000). The court relied on two previous decisions. In *Garberding* v. *INS*, 30 F.3d 1187 (9th Cir. 1994), the court ruled inconsistent treatment based on the fact the petitioner's expungement occurred pursuant to a statute that was not an exact counterpart to the FFOA violated equal protection. The *Garberding* Court reasoned, "distinguishing [petitioner] for deportation because of the breadth of Montana's expungement statute, not because of what she did, has no logical relation to the fair administration of the immigration laws." *Id.* The *Lujan* Court also cited *Paredes-Urrestarazu* v. *INS*, 36 F.3d 801, 812 (9th Cir. 1994), where it noted that a petitioner who met the requirements of the FFOA would be entitled to relief if his conviction was expunged under state law. *Id.* at 812. The *Paredes* Court found no rational reason to base the difference on "the mere fortuity that the state, and not the federal government, prosecutes an alien for a particular offense." *Id.*

After acknowledging the precedent of *Garberding* and *Paredes*, the *Lujan* Court considered petitioner's equal protection claim. The court determined § 1101(a)(48)(A) did not repeal the FFOA's protection against removal because the IIRIRA did not address the effect of expungements. *Lujan-Armendariz*, 222 F.3d at 743-44. The Ninth Circuit concluded the petitioner's expunged state narcotics conviction could not be the predicate for a removal order because he was eligible for amelioration under the FFOA. *Id.* Unlike the Seventh Circuit, the Ninth Circuit found no rational basis for treating persons guilty of an identical offense differently. *Id.* at 749. *See also Cardenas-Uriarte* v. *INS*, 227 F.3d 1132, 1138 (9th Cir. 2000) (remanding to the BIA to determine if petitioner's drug offense expunged pursuant to Arizona law qualified under the FFOA). Following *Lujan-Armendariz*, the BIA declined to acquiesce, limiting *Lujan-Armendariz* to the Ninth Circuit. *Matter of Salazar-Regino*, 23 I. & N. Dec. 223 (BIA 2002).

Lujan-Armendariz was expanded by *Dillingham* v. *INS*, 267 F.3d 996 (9th Cir. 2001), where the court ruled that a petitioner's right to equal protection was violated because a drug conviction expunged under a foreign statute was not recognized for immigration purposes. It reasoned, "equal protection considerations prohibit the government from treating differently aliens who have committed identical offenses and have had their convictions expunged, simply because of the origin of the statute under which they were lawfully rehabilitated." *Id.* at 1006.

B. The Rejection of the Ninth Circuit's Approach.

The Seventh Circuit has joined a growing chorus of courts that have registered their disapproval of

Lujan-Armendariz, exacerbating an already solidified circuit split. In *Acosta* v. *Ashcroft*, 341 F.3d 218 (3d Cir. 2003), the petitioner argued that since he met the requirements of the FFOA, equal protection required that the state expungement be recognized for immigration purposes. The Third Circuit determined the distinction between state and federal offenders withstood rational basis review: "Congress could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present a substantial threat of committing subsequent serious crimes. By contrast, Congress may have been unfamiliar with the operation of state schemes that resemble the FFOA." *Id.* at 227.

The Eleventh Circuit followed the Third Circuit's rationale. In *Resendiz-Alcaraz* v. *Ashcroft*, 383 F.3d 1262 (11th Cir. 2004), the BIA found the petitioner removable based on a drug conviction expunged after he had served one year of probation. Petitioner contended the BIA's reading of the IIRIRA violated equal protection, invoking *Lujan-Armendariz*. The Eleventh Circuit admitted petitioner was eligible for FFOA treatment had he been prosecuted under federal law, but found a rational basis for distinguishing between charges dismissed under the FFOA and state rehabilitative statutes. *Id.* at 1271-72. The Eleventh Circuit considered the Ninth Circuit's approach, but concluded, "[w]e are not persuaded by the court's reasoning in *Lujan-Armendariz*." *Id.* at 1271.

The Fifth Circuit also declined to follow the Ninth Circuit. In *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321 (5th Cir. 2004), the petitioner argued his expunged drug conviction should not serve as the basis for removal because equal protection required the same treatment for offenses expunged pursuant to federal and state laws.

Relying on the Third Circuit's reasoning in *Acosta*, the Fifth Circuit "reject[ed] this equal protection contention, as have all the courts of appeals which have considered it, other than the Ninth Circuit." *Id.* at 332.

The issue spawning this split is an important Constitutional interpretation on which the Court's guidance is urgently warranted. There is no reason to await further percolation of the issue. The Ninth Circuit's decision in *Lujan-Armendariz* has been the law of that circuit for five years and recent unpublished decisions establish it remains good law. The Ninth Circuit, per *Dillingham*, even recognizes expungements pursuant to foreign statutes. In the meantime, the Third, Fifth, Seventh, and Eleventh Circuits have definitively considered the issue and followed a different path. Additionally, the Eighth Circuit rejected the equal protection challenge of a petitioner who did not meet the requirements of the FFOA, recognizing "our decision today . . . conflict[s] with the Ninth Circuit's holding in *Lujan-Armendariz*." *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 698 (8th Cir. 2002). The Tenth Circuit also expressed reservations with *Lujan-Armendariz*. *Elkins* v. *Comfort*, 392 F.3d 1159, 1163 (10th Cir. 2004).

II. The Viability Of State Expungement Statutes For Immigration Purposes Is An Important And Recurring Question For Which Uniformity Is Necessary.

The numerosity of courts recently adjudicating this precise question represents the recurring nature of this issue. The proximity in time in which these cases have been decided underscores the discord between the circuits. The Seventh Circuit's vehement criticism of the Ninth Circuit in *Gill* further emphasizes the severity of this split.

Review of this case is essential because the question presented and the concomitant consequence of removal significantly affect a large number of people.

A. This Case Is An Appropriate Vehicle For Resolving The Question Presented.

This case has an optimal factual background for deciding the question presented. While the Seventh Circuit insinuates, in dicta, that Mr. Ramos is eligible for removal regardless of the expunged offense, (App. 9), this is belied by the record. Mr. Ramos had an I-130 family petition approved for his benefit on August 17, 1992. App. 28. He also possessed a valid social security number and proper employment verification documents. His parents, wife, and child are all United States citizens. App. 29. Mr. Ramos had his status adjusted over eleven years without incident. It was not until his drug conviction that the authorities initiated removal proceedings. More importantly, the decision below did not base its holding on Mr. Ramos' status. In denying Mr. Ramos' petition for review, the Seventh Circuit held that no equal protection violation existed, thus presenting the Court with a clear opportunity to answer the question presented.

The only factual inquiry necessary is limited to whether Mr. Ramos meets the requirements of the FFOA. The FFOA applies if a person is guilty of an offense described in 21 U.S.C. § 844, the Controlled Substances Act, has not previously been convicted of violating any drug laws, and has not previously been the subject of a disposition under the FFOA. 18 U.S.C. § 3607(a). Mr. Ramos meets the criteria of the FFOA. His offense satisfies the strictures of the Controlled Substances Act, he had no

criminal history prior to the underlying offense, he was not the subject of a disposition under the FFOA, and his punishment was a $500 fine.

The facts of this case contrast with those in which petitioners could not meet the FFOA's requirements. The Eighth Circuit rejected a petitioner's equal protection claim because he was not "sufficiently similar to a person eligible for FFOA treatment" due to a sentence of ten years' probation. *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 697 (8th Cir. 2002). In *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 333 (5th Cir. 2004), the petitioner's sentence included five years of probation, making her ineligible for the FFOA benefits and foreclosing the equal protection question. *See also Fernandez-Bernal* v. *Attorney General*, 257 F.3d 1304, 1316 (11th Cir. 2001) (rejecting an equal protection claim because sentence included jail time); *Elkins* v. *Comfort*, 392 F.3d 1159, 1163 (10th Cir. 2004) (rejecting an equal protection claim due to two years' probation). Unlike the foregoing, the facts below enable the Court to cleanly address the issue because Mr. Ramos satisfies the requirements of the FFOA. Since national uniformity on this issue is vital and the question stubbornly reasserts itself, certiorari is warranted.

B. The Seventh Circuit Ignored The Equal Protection Implications Of Its Decision.

Section 1101(a)(48)(A) did not, on its face, repeal the FFOA, rendering the FFOA still viable unless repealed by implication. The Court cautions against repeals by implication: "[i]nferring repeal from legislative silence is hazardous at best." *Cook County* v. *United States ex rel.*

Chandler, 538 U.S. 119, 132 (2003). Congress' manifest intent to repeal is the touchstone for finding repeal by implication. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). Congress' reticence regarding the FFOA is the antithesis of manifest intent. An irreconcilable conflict exists if there is a "positive repugnancy" between the laws. *Radzanower*, 426 U.S. at 155. None exists, as § 1101(a)(48)(A) defines "conviction" for immigration purposes while the FFOA carves out a narrow exception to that definition. *See Gill*, 335 F.3d at 578. While the BIA has not used the FFOA to preclude removal since the enactment of § 1101(a)(48)(A), it has never declared the FFOA does not operate as an exception to § 1101(a)(48)(A) or is superseded.

Congress' authority to expel aliens is largely immune from judicial control. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). However, this power is limited "by the Constitution itself and considerations of public policy and justice." *Zadvydas* v. *Davis*, 533 U.S. 678, 695 (2001) (quoting *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889)). Aliens are entitled to the guarantees of equal protection. *Plyler* v. *Doe*, 457 U.S. 202, 212-13 (1982). These guarantees are "a direction that all persons similarly situated should be treated alike." *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985).

The Seventh Circuit failed to scrutinize the equal protection implications of its holding. Two aliens convicted of the same offense who both meet the requirements of the FFOA are similarly situated. If one alien's offense is expunged under the FFOA and the other alien's offense expunged pursuant to state law, they are no less similarly situated. This example accentuates what is otherwise obvious; the only negligible distinction is the origin of the

statute pursuant to which each offense is expunged, yet the immigration consequences that flow from this fact are monumental. In *Roldan-Santoyo*, the BIA stated "Congress clearly does not intend that there be different immigration consequences accorded to criminals fortunate enough to violate the law" in one state versus another. *Roldan-Santoyo*, 22 I. & N. Dec. at 521. This line of reasoning applies as much to state-federal distinctions as it does to distinctions between two states. The Seventh Circuit's disregard for these principles presents a substantial reason for justifying review.

The Seventh and Third Circuits contended that Congress is unfamiliar with state laws resembling the FFOA. App. 11; *Acosta*, 341 F.3d at 227. This point is belied by the fact that states model their rehabilitative schemes on the FFOA. *See, e.g., Matter of Kaneda*, 16 I. & N. Dec. 677, 679 (BIA 1979) (Virginia law is a counterpart to the FFOA); *Matter of Haddad*, 16 I. & N. Dec. 253, 254 (BIA 1977) (Michigan's first offender statute is a state counterpart to the FFOA); *Matter of Werk*, 16 I. & N. Dec. 234, 236 (BIA 1977) (Wisconsin statute is a counterpart to the FFOA). Moreover, Congress could simply specify that a state rehabilitative statute must mirror the FFOA in order for an expungement to be recognized for immigration purposes. Congress' plenary authority enables it to limit eligibility for immigration relief however it sees fit. However, it cannot create a situation whereby similarly situated offenders are treated dissimilarly based solely on the forum of expungement.

Finally, the Seventh Circuit ignored the Court's instruction that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state

goal." *Plyler*, 457 U.S. at 225 (citing *De Canas* v. *Bica*, 424 U.S. 351 (1976)). The Nebraska expungement statute, in form and purpose, is no different than the FFOA. Nebraska, like most states, is attempting to alleviate the societal costs of supporting an alien's family after a wage earner is removed. The decision below constrains states in their efforts to effectuate criminal policies and avoid the harsh consequences of what amounts to using a cannon to shoot a sparrow. Without adequate justification, the Seventh Circuit has rendered a plethora of state provisions nugatory. The rationale of *Plyler* dictates Nebraska's statute is within the parameters of state authority.

The concern for uniformity has been recognized as deeply embedded in alien drug offense jurisprudence. The Seventh Circuit's failure to consider this precedent necessitates review. While there undoubtedly will be vagaries in sentencing between jurisdictions, the vastly disparate results, and the wholly innocuous factor prompting this disparity, are not rational. To employ radically different standards in the administration of any provision of the Immigration and Nationality Act is incompatible with the tenets of equal protection of the law.

CONCLUSION

The many federal appellate decisions addressing the extension of FFOA benefits to state expungements confirm the exceptional importance of this issue. Left undisturbed, the *sine qua non* of removal for many aliens will be whether their removal proceedings occur outside the

Ninth Circuit. For the foregoing reasons, petitioner respectfully requests the Court grant review of this motion.

Respectfully submitted,

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MIGUEL ANGEL RAMOS, Petitioner, v. ALBERTO R. GONZALES, Attorney General of the United States Respondent.*

*Pursuant to FED. R. APP. P. 43(c), we have substituted Alberto R. Gonzales, the present Attorney General of the United States, for his predecessor in office.

No. 03-4050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

414 F.3d 800; 2005 U.S. App. LEXIS 13967

September 30, 2004, Argued
July 12, 2005, Decided

COUNSEL: For MIGUEL A. RAMOS, Petitioner: Christopher Keleher, Westmont, IL.

For ALBERTO R. GONZALES, Respondent: Karen Lundgren, DEPARTMENT OF HOMELAND SECURITY, Office of the District counsel, Chicago, IL USA; John J. Andre, DEPARTMENT OF JUSTICE, Civil Division, Immigration Litigation, Washington, DC USA.

JUDGES: Before ROVNER, WOOD, and SYKES, Circuit Judges.

OPINION BY: WOOD

OPINION: WOOD, *Circuit Judge*. Until the recent enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), which among other things amended the judicial review provisions governing orders of removal in immigration cases, this case would have required a straightforward inquiry. If, as the government argued, Miguel Angel Ramos was being removed because he had

been convicted of a controlled substance offense, we would have had jurisdiction only to ensure that he was indeed the correct person, that the offense qualified as one covered by § 242(a)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a)(2)(C), and that Ramos raised no "substantial" constitutional claims. See *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997); *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001). If those preliminary inquiries demonstrated no flaws in the removal order, we would have lacked jurisdiction to proceed any further with the case. *Flores v. Ashcroft*, 350 F.3d 666, 668 (7th Cir. 2003).

The REAL ID Act has changed all of that. It amended INA § 242(a) to permit the courts of appeals on a proper petition for review to consider constitutional claims and questions of law. See REAL ID Act § 106(a)(1)(A)(iii), amending 8 U.S.C. § 1252(a)(2) by adding a new subpart (D). This amendment was effective on the date of the enactment of the statute, May 11, 2005, and applies to all appeals from removal orders "issued before, on, or after the date of enactment." REAL ID Act § 106(b). We must therefore consider Ramos's arguments that the government violated his constitutional rights in the proceedings that led to his order of removal. We conclude that his rights were not infringed, and we therefore deny Ramos's petition for review.

I

In August 2000, Nebraska officials arrested Ramos for attempted possession of cocaine, charging him with violating Neb. Rev. Stat. §§ 28-201 and 28-416 (2003). Aside from the fact that he was doing the wrong thing, he was also in the wrong place at the wrong time. Ramos is a

native and citizen of Mexico, who had entered the United States at some earlier point "without inspection," as the euphemism goes. This arrest led to a *nolo contendere* plea in state court, triggering a series of unfortunate events. Nebraska sentenced Ramos to a fine of $500 and court costs. As with many in his position, however, that formal punishment was slight compared to the real-world consequences of his mistake; his plea spelled the end to his effort to have his status adjusted based on his marriage to a U.S. citizen. Although the record on this part of the case is incomplete, Ramos asserts in his reply brief that he had an I-130 family petition approved for his benefit on August 17, 1992, and he had remained in this country ever since, complete with social security number and employment verification documents. The immigration authorities ultimately denied his application for adjustment on January 24, 2003, however, apparently because of the Nebraska conviction. Finally, the conviction prompted the then-INS to initiate removal proceedings against him (also on January 24, 2003), claiming that he was removable on two grounds: first, as an alien who was present in the United States without being admitted or paroled, INA § 237(a)(6)(A)(i), as amended, 8 U.S.C. § 1182(a)(6)(A)(i); and second, as a person who was automatically removable for committing a controlled substance offense, INA § 212(a)(2)(A)(i)(II); 8 U.S.C. § 1182(a)(2)(A)(i)(II).

On February 10, 2003, Attorney Bart A. Chavez entered his appearance before the immigration court on behalf of Ramos. He presented a form (EOIR-28) that Ramos purportedly had signed, which authorized Chavez to represent him. One of the first actions Chavez took on Ramos's behalf was to file a motion before the Nebraska court to set aside Ramos's drug conviction, relying on the

authority conferred by Neb.Rev.Stat. § 29-2264. That court granted the motion in an order dated March 10, 2003, stating that "the adjudication previously entered by this Court is hereby set aside and nullified, and the Court further orders that all civil disabilities and disqualifications imposed as a result of said adjudication are hereby removed."

After that date, proceedings continued before Immigration Judge (IJ) James R. Fujimoto, who sits on the Chicago immigration bench. Ramos, his lawyer, the witnesses, and the government's lawyer participated by teleconference from Council Bluffs, Iowa, as we noted in an earlier decision in this matter. See *Ramos v. Ashcroft*, 371 F.3d 948 (7th Cir. 2004) (*Ramos I*). In that opinion, we rejected the government's argument that venue for this appeal properly lies in the Eighth Circuit rather than this court. *Id.* at 949. Although the government has now asked us to reconsider that decision, based on a new order issued by Chief Immigration Judge Michael J. Creppy that states that hearings will be presumed to be where the parties and lawyers are located, not where the IJ is, we decline the invitation. *Ramos I* established the law of the case with respect to venue for this proceeding, and we thus move on to the merits.

We said earlier that Ramos "participated" in the hearings held in Council Bluffs before the Chicago judge, but one of the points Ramos now raises before us is that he never appeared in person during any of the three IJ hearings leading up to his removal. At the preliminary hearing held on March 24, 2003, Chavez appeared on behalf of Ramos and announced that Ramos was waiving his right to appear in person. After a brief discussion, Judge Fujimoto continued the hearing to April 28, 2003. At

that time, Chavez again appeared and again said that Ramos was waiving his right to appear. Chavez also made two important concessions at the April 28 hearing: he confirmed the existence of Ramos's substance abuse conviction (which by then the Nebraska court had expunged); and he conceded the facts alleged in the Notice to Appear relating to Ramos's presence in the United States without admission or inspection. The judge then continued the hearing until May 12, 2003. At that last hearing, Chavez again appeared for Ramos and for the third time waived Ramos's right to appear. At the conclusion of the hearing, the IJ issued an oral decision ordering Ramos removed from the United States.

In his opinion, the IJ found Ramos removable on both grounds that the INS had alleged. Based on Chavez's representation that Ramos admitted the factual allegations in the Notice to Appear, the IJ concluded that Ramos was removable under §212(a)(6)(A)(i) of the INA for being present without admission or parole. With respect to the Nebraska conviction, the judge first acknowledged the state court's action setting it aside. Nevertheless, the judge noted that the Board of Immigration Appeals (BIA) had held in *Matter of Roldan-Santoyo*, 22 I & N Dec. 512 (BIA 1999), that dismissals under a state rehabilitative statute like Neb.Rev.Stat. § 29-2264 do not erase a conviction for immigration purposes. For that reason, the IJ found that Ramos was also removable because he had a conviction covered by 8 U.S.C. § 1101(a)(48)(A) (his controlled substance offense), for which there had been a formal judgment of guilt and a form of punishment (the $500 fine).

At that point, Ramos (represented by new counsel) returned to the Nebraska court and secured an order *nunc*

pro tunc, which reissued the March 18 expungement order and added the following language: "The Court further finds that since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes § 29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation." Equipped with this order, Ramos went to the BIA and filed a motion to remand the case to the IJ with instructions that the decision be reconsidered. The BIA refused to do so. Instead, it affirmed the IJ's decision and denied the motion to remand. It found no due process violation based on Ramos's lack of personal attendance at the three hearings. It said nothing about any equal protection claim. It did, however, find that Ramos had not met his burden under *In re Lozada*, 19 I. & N. Dec. 637 (BIA 1988), of showing that his counsel was ineffective; and it concluded that the conviction, even with the extra language about rehabilitation, sufficed for immigration purposes. On the last point, the BIA relied on this court's decision in *Gill v. Ashcroft*, 335 F.3d 574, 577-78 (7th Cir. 2003), which upheld the rule of *Matter of Roldan*. Ramos then petitioned for review in this court.

II

Before this court, Ramos has presented two constitutional arguments for relief: first, that the manner in which the government conducted the proceedings before the IJ violated his due process rights, and second, that it violates equal protection principles to remove him based on his now-expunged, minor state court conviction, when the government could not remove him on that basis had he been convicted under the analogous Federal First Offender

Act (FFOA), 18 U.S.C. § 3607. Our ability to reach these arguments was limited before the passage of the REAL ID Act. At this point, however, as we noted at the outset of this opinion, the INA now says that "nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." REAL ID Act § 106(a)(1)(iii), amending 8 U.S.C. § 1252(a)(2). We therefore proceed directly to Ramos's two constitutional arguments.

Due Process. Ramos is correct insofar as he argues that the Fifth Amendment to the Constitution entitles aliens to removal proceedings that comport with due process. See *Zadvydas v. Davis*, 533 U.S. 678, 693, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001); *Capric v. Ashcroft*, 355 F.3d 1075, 1087 (7th Cir. 2004). It is not enough, however, to show that the procedures used fell short in some constitutionally significant way. In order to prevail on a due process claim, the petitioner must establish that the violations that occurred were prejudicial to him. *Capric*, 355 F.3d at 1087. The due process violation must have been one likely to have an impact on the result of the proceeding. *Id.* at 1087-88.

Whether or not Ramos is correct that the IJ's procedures fell short of the constitutionally required standard, we conclude that he cannot show prejudice on this record. There is no ironclad rule that aliens subject to removal procedures have a right personally to be present for every stage of the proceeding, unless extraordinary circumstances are present. *Cf.* U.S. CONST. amend. VI; FED. R. CRIM. P. 43(a). To the contrary, the INA allows a removal

proceeding to take place in the absence of the alien if that absence is "agreed to by the parties." See 8 U.S.C. § 1229a(b)(2)(A)(ii). Here, Ramos signed an EOIR-28 form recognizing Chavez as his lawyer, and Chavez then expressly waived appearance on Ramos's behalf on three separate occasions.

Ramos argues, however, that this is not good enough, at least where the IJ never asked him in person whether Chavez was really his counsel of choice. He points to 8 C.F.R. § 1240.10(a)(1) as authority for this requirement. Putting to one side the question whether a violation of this regulation would at the same time violate Ramos's due process rights, we think that Ramos is probably reading too much into the rule. That section reads as follows:

> (a) In a removal proceeding, the immigration judge shall:
>
> (1) Advise the respondent of his or her right to representation, at no expense to the government, by counsel of his or her own choice authorized to practice in the proceedings.

Although the regulation uses the word "shall" when referring to the judge's duty, the point of this rule seems to be to assure that the alien knows about the right to counsel regardless of financial circumstances. When he has already gotten a lawyer and the lawyer submits form EOIR-28, it is hard to see how the IJ's failure to issue the prescribed advice would prejudice the alien.

Even if we assume that there is something either in this regulation or in due process standards generally that requires that the alien be present for the critical stages of his hearing, Ramos has not shown how the failure to meet that requirement prejudiced him. See *Kuschchak v.*

Ashcroft, 366 F.3d 597, 602 (7th Cir. 2004). He does not, even now, challenge the truth of the five allegations on which the IJ relied. Those allegations were as follows:

> 1. Ramos is not a national of the United States.
>
> 2. Ramos is a native of Mexico and a citizen of Mexico.
>
> 3. Ramos arrived in the United States at or near an unknown place, on or about an unknown time.
>
> 4. He was not then admitted or paroled after inspection by an Immigration Officer (or he arrived at a time or place other than as designated by the Attorney General).
>
> 5. He was, on September 22, 2000, convicted in the County Court of Hall County, Nebraska, for the offense of Attempted Possession of a Controlled Substance, to wit: Cocaine, in violation of sections 28-201 and 28-416, Nebraska Revised Statutes.

Before this court, Ramos has not even tried to contradict those five points as a matter of fact. Allegations 1 through 4 are enough in themselves to support the order of removal, before we even consider the legal issue Ramos has raised about Allegation 5. Under the circumstances, there is no need to discuss Ramos's other due process complaints in detail. Whatever procedural slips the IJ may have made did not, in the end, result in the kind of prejudice to Ramos that would justify a remand for further proceedings on due process grounds.

We add for the sake of completeness that Ramos has not denied that Nebraska convicted him of a cocaine offense. He argues only that the state court's action

expunging his conviction should relieve him of the legal consequences of that conviction for immigration purposes. In *Gill v. Ashcroft*, *supra*, however, we discussed 8 U.S.C. § 1101(a)(48)(A), which defines the term "conviction" for purposes of 8 U.S.C. § 1227(a)(2)(B)(i). The statute requires only a formal judgment of guilt entered by a court (which includes a plea of *nolo contendere*) and some form of "punishment, penalty, or restraint on the alien's liberty." When those criteria are met, the government may remove the alien. We wrote further that "every court that has considered the subject believes that § 1101(a)(48)(A) governs the handling of repeat offenders and that expungements (or restorations of civil rights) under state law do not negate a 'conviction' for purposes of immigration law." 335 F.3d at 577. Although the question in *Gill* had to do with the treatment of deferred dispositions, the underlying decision to defer to the BIA's characterization of the conviction for immigration purposes applies here as well. Thus, the Nebraska conviction provides an independent basis for rejecting Ramos's challenge to the BIA's decision.

Equal Protection. Ramos's equal protection argument relies on the fact that the government is treating his state conviction more harshly than it would an analogous conviction under the FFOA, 18 U.S.C. § 3607. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 30 L. Ed. 220, 6 S. Ct. 1064 (1886) (holding that aliens are entitled to equal protection of the law). The first problem with this contention is once again *Gill*. Addressing a similar point, this court held that there is a distinction between prosecution in federal court and prosecution in state court, and that we are bound to observe that distinction as long as § 1101(a)(48)(A) reads as it does. 335 F.3d at 578. Second, Ramos's premise – that

someone with a FFOA conviction would escape immigration consequences – is not necessarily correct. We do not know what the BIA would do if it were confronted with this situation, nor do we know whether its decision would pass legal muster. All we can say is that since the 1996 changes to the INA, the BIA has never used the FFOA to preclude removal. Finally, Ramos's assumption that it is utterly irrational to treat the FFOA and state convictions like his differently goes too far. State laws vary considerably, and the BIA (as well as Congress) reasonably might have thought that the law should entitle only persons who actually have been charged and sentenced under the FFOA to leniency for immigration purposes.

III

While we realize that Ramos is paying a heavy price for a drug deal that the prosecuting jurisdiction – Nebraska – initially treated as a small-time misstep and later erased, it is the price that Congress has prescribed under the immigration statutes. Even if there were flaws in the procedures that led to his order of removal, we can find no prejudice to him as a matter of due process. Similarly, we reject his equal protection challenge to his order of removal. The petition for review is therefore DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A77-862-762 – Chicago Date: Oct. 24, 2003

In re: RAMOS RAMOS, MIGUEL ANGEL

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Feiertag, Terry Yale

ON BEHALF OF DHS: Stultz, Paul R.

ORDER:

PER CURIAM. We affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision").

We find no due process violations. Former counsel waived the respondent's appearance at all three hearings (Tr. at 1, 5, 11). The respondent has not met any of the three requirements in *Matter of Lozada*, 19 I&N Dec. 637 (BIA), *aff'd*, 857 F.2d 10 (1st Cir. 1988), to show ineffective assistance of former counsel.

The respondent contends on appeal that the record of conviction relied on by the Immigration Judge as a basis for his removal order is not evidence on which a removal order may lawfully be based. We do not agree. The deputy

clerk of the County Court of Hall Country, Nebraska, certified the conviction record on the reverse side of page three (Exh. 2). Page three of the conviction record is a complaint dated May 26, 2000, in case number CROO-1989 in the same court. The respondent was charged with attempted possession of a controlled substance (cocaine). Page two of the conviction record is the respondent's not guilty plea dated May 30, 2000, in case number CROO-1989 in the same court. The regulations at 8 C.F.R. § 3.41(a)(2) provide, in pertinent part, that a record of plea is admissible as evidence in proving a criminal conviction. Page one of the conviction record discloses that on August 22, 2000, in case number CROO-1989 in the same court the respondent changed his plea to nolo contendere, was found guilty as charged, and was sentenced to a $500 fine, court costs, and witness fees. The regulations at 8 C.F.R. § 3.41(a)(2) provide that a record of plea, verdict, and sentence shall be admissible as evidence in proving a criminal conviction.

We note that a $500 fine constitutes a penalty within the provisions of section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A).

At the removal hearing on March 24, 2003, the Immigration Judge admitted the conviction record into evidence as Exhibit 2. Former counsel did not object to admission of the conviction record into evidence (Tr. at 1). The conviction record is marked as Exhibit 2 and is dated March 24, 2003. We find that the conviction record provides a lawful basis for the removal order.

We find that the respondent's motion to remand must be denied. The state criminal court's nunc pro tunc order dated June 17, 2003, stated that rehabilitative efforts of

the respondent were not considered. However, section 29-2264(3) of the Nebraska Revised Statutes provides, in pertinent part, that in determining whether to set aside the conviction, the court *shall* consider the behavior of the offender after sentencing and the likelihood that the offender will not engage in further criminal activity (Exh. 3-E). Even though the state criminal court stated that it did not consider these items, this does not change the nature of the statute, which is a state rehabilitative statute. *See Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003) (upholding *Matter of Roldan*); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), *rev'd in part, Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute; once an alien is subject to a "conviction" as that term is defined at section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure).

Accordingly, the appeal is dismissed and the motion is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File A 77 862 762 – Omaha

In the Matter of

MIGUEL ANGEL RAMOS RAMOS,	)	IN REMOVAL
Respondent	)	PROCEEDINGS
	)	

CHARGES: Section 212(a)(6)(A)(i) – present without being admitted or paroled; Section 212(a)(2)(A)(i)(II) – conviction of a crime relating to a controlled substance.

APPLICATION:

ON BEHALF OF RESPONDENT:	ON BEHALF OF GOVERNMENT[1]:
Bart A. Chavez, Esquire 2809 South 125th Avenue Suite 284 Omaha, Nebraska 68144	Paul R. Stultz, Esquire District Counsel Department of Homeland Security Omaha, Nebraska

DECISION OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Mexico who arrived in the United States without inspection. The Immigration and Naturalization Service commenced removal proceedings against the respondent through the issuance of a Notice to Appear on January 24, 2003 charging

[1] Formerly the Immigration and Naturalization Service

him with removability under the above captioned sections of the Immigration and Nationality Act.

At a removal hearing the respondent has admitted factual allegations 1 through 5. See also Exhibit 2. Based upon these admissions as well as the evidence of record, I find that the respondent's removability under Section 212(a)(6)(A)(i) of the Act has been established by evidence which is clear and convincing.

The respondent, however, argues that he is not removable under Section 212(a)(2)(A)(i)(II) because his conviction was expunged on March 18, 2003. (See Exhibit 3 tab 3).

The term "conviction" as set forth in Section 101(a)(48)(A) of the Immigration and Nationality Act is defined as "a formal judgement of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where – (i) a Judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; (ii) the Judge has ordered some form of punishment, penalty or restraint on the aliens liberty to be imposed.

The Board of Immigration Appeals applied this definition to an alien who had been convicted of a controlled substance violation under a first offenders statute in holding that "no effect is to be given in Immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation by a state rehabilitative statute." *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Board in Roldan also stated "our decision is limited to those circumstances where an alien has been the beneficiary of a state rehabilitative statute which purports to erase the record of guilt. It does not address the situation where the alien has had his or her conviction vacated by a state court on direct appeal wherein the Court determines that vacation of the conviction is warranted on the merits, or on grounds relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings."

The statute under which the respondent's conviction was set aside is Neb. rev. stat. Section 29-2264 which states, inter alia: "(2) whenever any person is convicted of a misdemeanor or felony and is placed on probation by the Court or is sentenced to a fine only, he or she may after payment of any fine petition the sentence in court to set aside the conviction. (3) In determining whether to set aside the conviction the Court shall consider: (a) the behavior of the offender after sentencing; (b) the likelihood that the offender will not engage in further criminal activity; (c) any other information the Court considers relevant."

Based upon a review of this statute along with the above-cited authorities I find that the respondent's conviction is final for Immigration purposes.

First the record of conviction (Exhibit 2, 3 – tab A) indicates that a judgement was entered on April 22, 2000. Arguably, then, it is a "formal judgement of guilt of the alien entered by a Court" within the meaning of the first clause of Section 101(a)(48)(A) of the Act.

In the alternative the respondent was clearly found guilty by the Court pursuant to his plea and the $500 fine

imposed by the Judge appears to constitute a "form of punishment, penalty or restraint upon his liberty."

The respondent argues that his case is analogous to the Board's decision in the *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) wherein it was held that "a conviction that has been vacated pursuant to Article 440 of the New York criminal procedure law does not constitute a conviction for Immigration purposes within the meaning of Section 101(a)(48)(A)."

However the order of the sentencing court in *Rodriguez*, unlike here, unequivocally vacates the conviction *on the legal merits* (emphasis added) and is therefore distinguishable.

Accordingly I find that the respondent's removability under Section 212(a)(2)(A)(i)(II) of the Act has also been demonstrated by evidence which is clear and convincing. The respondent concedes that he is not presently eligible for any form of relief. Accordingly the following order will be entered:

ORDER

IT IS ORDERED that the respondent be removed from the United States to Mexico under the above captioned sections of the Immigration and Nationality Act.

/s/ [Illegible]
JAMES R. FUJIMOTO
Immigration Judge
Dated: May 12, 2003

IN THE COUNTY COURT OF
HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	Case No. CR00-1989
v.	)	ORDER
MIGUEL ANGEL RAMOS,	)	(Filed Mar. 18, 2003)
	)	
Defendant.	)	

NOW ON this 18 day of March, 2003 this matter came on for hearing on the Amended Motion to Expunge and Set Aside the Conviction of the Defendant.

THE COURT, being fully advised in the premises, FINDS and ORDERS that said Motion should be and hereby is sustained. The adjudication previously entered by this Court is hereby set aside and nullified, and the Court further orders that all civil disabilities and disqualification's imposed as a result of said adjudication are hereby removed.

BY THE COURT,

/s/ [Illegible]
County Judge (SEAL)

18 U.S.C.S. § 3607. Special probation and expungement procedures for drug possessors

(a) Pre-judgment probation. If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844) –

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565 [18 USCS § 3565].

(b) Record of disposition. A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement

provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

(c) Expungement of record of disposition. If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

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8 U.S.C.S. § 1101. Definitions

(a)

(48)(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or no'o contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

R.R.S. Neb. § 29-2264. Probation; completion; conviction may be set aside; conditions; retroactive effect

(1) Whenever any person is placed on probation by a court and satisfactorily completes the conditions of his or her probation for the entire period or is discharged from probation prior to the termination of the period of probation, the sentencing court shall issue an order releasing the offender from probation. Such order in all felony cases shall provide notice that the person's voting rights are not restored upon completion of probation. The order shall include information on restoring such civil rights through the pardon process, including application to and hearing by the Board of Pardons.

(2) Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.

(3) In determining whether to set aside the conviction, the court shall consider:

(a) The behavior of the offender after sentencing;

(b) The likelihood that the offender will not engage in further criminal activity; and

(c) Any other information the court considers relevant.

(4) The court may grant the offender's petition and issue an order setting aside the conviction when in the opinion of the court the order will be in the best interest of the offender and consistent with the public welfare. The order shall:

(a) Nullify the conviction; and

(b) Remove all civil disabilities and disqualifications imposed as a result of the conviction.

(5) The setting aside of a conviction in accordance with the Nebraska Probation Administration Act shall not:

(a) Require the reinstatement of any office, employment, or position which was previously held and lost or forfeited as a result of the conviction;

(b) Preclude proof of a plea of guilty whenever such plea is relevant to the determination of an issue involving the rights or liabilities of someone other than the offender;

(c) Preclude proof of the conviction as evidence of the commission of the misdemeanor or felony whenever the fact of its commission is relevant for the purpose of impeaching the offender as a witness, except that the order setting aside the conviction may be introduced in evidence;

(d) Preclude use of the conviction for the purpose of determining sentence on any subsequent conviction of a criminal offense;

(e) Preclude the proof of the conviction as evidence of the commission of the misdemeanor or felony in the event an offender is charged with a subsequent offense and the penalty provided by law is increased if the prior conviction is proved;

(f) Preclude the proof of the conviction to determine whether an offender is eligible to have a subsequent conviction set aside in accordance with the Nebraska Probation Administration Act; or

(g) Preclude use of the conviction as evidence of commission of the misdemeanor or felony for purposes of determining whether an application filed or a license issued under sections 71-1901 to 71-1905 or the Child Care Licensing Act or a certificate issued under sections 79-806 to 79-815 should be denied, suspended, or revoked.

(6) Except as otherwise provided for the notice in subsection (1) of this section, this section shall be retroactive in application and shall apply to all persons, otherwise eligible in accordance with the provisions of this section,

whether convicted prior to, on, or subsequent to June 11, 1993.

USCS Const. Amend. 5 (2005)

Criminal actions – Provisions concerning – Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IN THE COUNTY COURT
OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA Plaintiff, vs. MIGUEL ANGEL RAMOS, Defendant.	)	Case No. CR 00-1989 **ORDER NUNC PRO TUNC** (Filed Jun. 18, 2003)

This matter came on before the Court on the 18 day of June, 2003, on the Defendant's Motion for Order Nunc Pro Tunc. The court being advised in the premises Orders as follows:

1. The Motion to Set Aside Conviction, should be and hereby is sustained. The Order previously entered setting aside and nullifying the adjudication previously entered in this case is modified to read, "The Plea and Conviction previously entered in this cause on August 22, 2000 are hereby set aside, vacated and nullified, and the Court further Orders that all civil disabilities and disqualifications imposed as a result of said adjudication are hereby removed".

2. The Court further finds that since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes §29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation.

By the Court:

/s/ [Illegible]
County Judge

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

Matter of File A 77 862 762

MIGUEL ANGEL RAMOS RAMOS,	)	IN REMOVAL PROCEEDINGS
	)	
	)	
Respondent	)	Transcript of Hearing

Before JAMES R. FUJIMOTO, Immigration Judge

Date: April 28, 2003 Place: Chicago, Illinois

Transcribed by DEPOSITION SERVICES, INC. at Rockville, Maryland

Official Interpreter:

Language:

Appearances:

For the Immigration and Naturalization Service:	For the Respondent:
D. Allen Kenny, Esquire	Bart A. Chavez, Esquire

* * *

JUDGE TO COUNSEL

Well, I had red over the brief when it was initially filed, I also red over not only *Roldan* but also *Rodriquez Ruiz,* that's Int. Dec. 3436 and with all due respect, I believe that this does in fact constitute a conviction for

immigration purposes that still remains that it was not vacated or that it was, I don't find any distinction in this in Roldan. I don't find this distinction significant. What I'll do is set forth my findings in writing.

JUDGE TO MR. CHAVEZ

Q. In light of this fact, is your client seeking relief?

A. No, Your Honor, I, you know, unfortunately the respondent does have an approved I-130 and I believe he has a pending adjustment application. Unfortunately the Court finds otherwise he's barred for adjusting status, Judge.

Q. Right, even.

A. To the best of my recollection.

Q. Right.

MR. KENNY TO JUDGE

Q. I need one clarification that is that the I-130 was approved August 17th of 1992, before he finally was denied by the Service, January 24th of 2003.

[10] A. Okay and that was based on a conviction?

Q. Yes.

JUDGE FOR THE RECORD

And although the respondent would technically have the right to renew the I-485 in these proceedings that essentially the same result would appear that's not, if it's treated as a final conviction, it's not waiveable, okay.

Hon'ble Fujimoto
United States Immigration Judge
Cicago' IL

May 08, 2003

Hastings, NE

Re: Ramos'A. Miguel (A# 077 862 762

(Filed May 12, 2003)

Dear Honorable JUDGE Fujimoto:

I am currently being detained by INS at their Hastings Detention Center, Nebraska. Iam currentlu in immigration proceeding and my hearing is schedule on MAY 12, 2003.

1. I was arrested by the INS on January 24, 2003 when Ivisited INS for: GREENCARD: interview. The basis for deportation is my conviction in 2000 for less than 5 grams cocane.

2. This drug conviction has since been set aside by the Clark Hall Court House. This conviction for only drug posession. It is almost thre years sinse I PLEADED guilty to that charge. In addition to being set aside this case, I have never been involved with drugs again and can assure that I will never will get involved with any types of drugs.

3. Im married and have a almost 2 year child born in the United States. My wife is also a U.S. citizen and perfectly law abiding peopl. In addition, My parents and ather siblins are also in the United States Legaly and not involved with any type of drugs.

4. I was working as Electrical Apprsntice when the INS arested me in January. They have promised to give my position after my releas. Im the sole erner in my famyly and resposible for mortgage,

insurance and payments. My famyly will undue hardship if am separated from them.

I swear and promise never to get involved with drugs use again and can guarantee to be a useful resident in the United States. My self and my wife are also involved with helping homeles people partisipating in other activaties through church. Inaddition, all of family members are productive members of society. I beg you to consider me allowing to stay in this country in light of my drug conviction having set aside.

Respectfuly,

Miguel Ramos, c/o Hastings Correctional Center,
p. o box 2048
Hastings, NE 68902

/s/ Miguel A Ramos

(2)

No. 05-467

In the Supreme Court of the United States

MIGUEL ANGEL RAMOS, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether it violates the equal protection component of the Due Process Clause of the Fifth Amendment to remove an alien on the basis of a conviction expunged under a state rehabilitative statute if the alien satisfied the requirements of the Federal First Offender Act, 18 U.S.C. 3607.

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In the Supreme Court of the United States

No. 05-467

MIGUEL ANGEL RAMOS, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 414 F.3d 800. The decisions of the Board of Immigration Appeals (Pet. App. 12-14) and the immigration judge (Pet. App. 15-18) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 2005. The petition for a writ of certiorari was filed on October 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Aliens convicted of certain drug offenses face a number of immigration consequences. For example, under Section 212(a)(2)(A)(i)(II) of the Immigration and

Nationality Act (INA), 8 U.S.C. 1182(a)(2)(A)(i)(II), an alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)" is inadmissible. See also 8 U.S.C. 1227(a)(2)(B)(i) (alien convicted of drug offense is deportable).

In 1984, Congress enacted the Federal First Offender Act (FFOA), 18 U.S.C. 3607. Under that law, if a person is found guilty of simple possession of a controlled substance, in violation of 21 U.S.C. 844, has no prior drug convictions, and has not previously had a case disposed of under the FFOA, the district court may place the person on probation "for a term of not more than one year without entering a judgment of conviction." 18 U.S.C. 3607(a). If, at the end of the term of probation, the person has not violated any condition of probation, "the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation." *Ibid.* If a conviction is expunged under the FFOA, it "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. 3607(b). In *In re Manrique*, 21 I. & N. Dec. 58 (1995), the Board of Immigration Appeals (BIA) ruled that "an alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) * * * had he been prosecuted under federal law." 21 I. & N. Dec. at 64.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 322(a),

110 Stat. 3009-628, Congress amended the INA by adding Section 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A), which defines "conviction." Under that provision, the term means either that there has been "a formal judgment of guilt of the alien entered by a court" or that "adjudication of guilt has been withheld" but "(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt" and "(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *Ibid.* In *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999), vacated *sub nom. Lujan-Armendariz* v. *INS*, 222 F.3d 728 (9th Cir. 2000), the BIA ruled that its decision in *Manrique* had been "superseded by section 101(a)(48)(A)." 22 I. & N. Dec. at 528. Under *Roldan*, "[s]tate rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Ibid.*

2. Petitioner is a native and citizen of Mexico who entered the United States illegally at an unknown place and time. Pet. App. 2-3. In August 2000, he was charged with attempted possession of cocaine, in violation of Neb. Rev. Stat. §§ 28-201 and 28-416 (2003). Pet. App. 2. He pleaded *nolo contendere* and was sentenced to a fine of $500. *Id.* at 3.

In January 2003, the Immigration and Naturalization Service (INS) initiated removal proceedings. Pet. App. 3.[1] It alleged that petitioner was removable on two inde-

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement

pendent grounds: he was "[a]n alien present in the United States without being admitted or paroled," 8 U.S.C. 1182(a)(6)(A)(i); and he had been convicted of an offense "relating to a controlled substance," 8 U.S.C. 1182(a)(2)(A)(i)(II). Pet. App. 3.

After the commencement of removal proceedings, petitioner filed a motion in Nebraska court to set aside his drug conviction. Pet. App. 3. Petitioner relied (*id.* at 3-4) on Neb. Rev. Stat. § 29-2264 (2003), which permits a person sentenced only to a fine to petition the sentencing court to set aside the conviction; directs the court, in ruling on such a motion, to consider the person's behavior after sentencing, the likelihood that he will not commit other crimes, and any other relevant information; and provides that an order setting aside a conviction shall "[n]ullify the conviction" and "[r]emove all civil disabilities and disqualifications imposed as a result of the conviction." *Id.* § 29-2264(2), (3) and (4). In March 2003, the court granted the motion. Pet. App. 4. Its order stated that "the adjudication previously entered by this Court is hereby set aside and nullified, and the Court further orders that all civil disabilities and disqualifications imposed as a result of said adjudication are hereby removed." *Ibid.*

3. An immigration judge (IJ) ruled that petitioner was removable on both of the grounds alleged, and ordered him removed to Mexico. Pet. App. 15-18. Relying on the definition of "conviction" in Section 101(a)(48)(A) of the INA and the BIA's decision in *Roldan*, the IJ rejected petitioner's contention that he was not removable

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in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

under Section 212(a)(2)(A)(i)(II) of the INA because his conviction had been expunged. Pet. App. 16-18.

Petitioner appealed the IJ's decision to the BIA. Pet. App. 6. Before the appeal was decided, petitioner returned to the Nebraska court and obtained an order, *nunc pro tunc*, that reissued the March 2003 expungement order and added the following language: "The Court further finds that since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes § 29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation." *Id.* at 5-6. After the order was reissued, petitioner filed a motion with the BIA to remand the case to the IJ with instructions to reconsider his decision. *Id.* at 6.

4. The BIA dismissed petitioner's appeal and denied his motion for a remand. Pet. App. 12-14. In denying the motion, the BIA explained that the Nebraska court's *nunc pro tunc* order "does not change the nature of the statute, which is a state rehabilitative statute," and that, under Section 101(a)(48)(A) and *Roldan*, an alien "remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure." Pet. App. 14.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1-11.

Petitioner's first contention on appeal was that "the manner in which the government conducted the proceedings before the IJ violated his due process rights." Pet. App. 6. The court of appeals rejected that contention on the ground that, "[w]hether or not [petitioner] is correct that the IJ's procedures fell short of the constitutionally

required standard," he "cannot show prejudice on this record." *Id.* at 7. In so holding, the court noted that petitioner "does not, even now, challenge the truth of the five allegations on which the IJ relied"—namely, that petitioner is not a national of the United States; that he is a native and citizen of Mexico; that he arrived in the United States at an unknown place and time; that he was not then admitted or paroled after inspection by an immigration officer; and that he was convicted of attempted possession of cocaine in a Nebraska court. *Id.* at 9. The court also observed that the first four allegations were "enough in themselves to support the order of removal" without regard to petitioner's claim concerning the drug conviction. *Ibid.*

Petitioner's second contention on appeal was that "it violates equal protection principles to remove him based on his now-expunged, minor state court conviction," when, according to petitioner, "the government could not remove him on that basis had he been convicted under the analogous [FFOA]." Pet. App. 6. The court of appeals rejected that contention on three grounds. First, the court relied on *Gill* v. *Ashcroft*, 335 F.3d 574 (7th Cir. 2003), which "upheld the rule of *Matter of Roldan*," Pet. App. 6, and rejected a claim that was "similar" to the one raised by petitioner, *id.* at 10. Second, the court believed that the premise that "someone with a FFOA conviction would escape immigration consequences" is "not necessarily correct." *Id.* at 11. The court explained that, "since the 1996 changes to the INA, the BIA has never used the FFOA to preclude removal," and that it therefore cannot be known "what the BIA would do if * * * confronted with this situation" or "whether its decision would pass legal muster." *Ibid* Third, the court believed that, even if the FFOA *would*

preclude removal of an alien convicted of a federal drug offense, the assumption that "it is utterly irrational to treat [convictions covered by] the FFOA and state convictions like [petitioner's] differently" goes "too far." *Ibid.* The court explained that "[s]tate laws vary considerably," and that "the BIA (as well as Congress) reasonably might have thought that the law should entitle only persons who actually have been charged and sentenced under the FFOA to leniency for immigration purposes." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-16) that removing him on the basis of his drug conviction violated his right to equal protection. The court of appeals correctly held otherwise, and further review is unwarranted.

1. Petitioner's equal protection theory has two parts. First, petitioner contends that, in determining the immigration consequences for an alien convicted of a *federal* offense who satisfies the requirements of the FFOA, it is the FFOA rather than Section 101(a)(48)(A) of the INA that governs, because the latter provision "did not * * * repeal" the former. Pet. 13. Second, petitioner contends that, in determining the immigration consequences for an alien convicted of a *state* offense who has had the conviction expunged under a state rehabilitative statute and satisfies the requirements of the FFOA, it is likewise the FFOA rather than Section 101(a)(48)(A) that must govern, because there is no rational basis for treating state and federal convictions differently, and doing so would therefore be "incompatible with the tenets of equal protection of the law." Pet. 16. Petitioner's theory lacks merit, because each part of it is mistaken.

First, as the court of appeals recognized, and as respondent concedes (Pet. 14), "the BIA has never used the FFOA to preclude removal" of an alien convicted of a federal offense "since the 1996 changes to the INA" (Pet. App. 11). It therefore cannot be known "what the BIA would do if it were confronted with this situation," or "whether its decision would pass legal muster." *Ibid* If the BIA ultimately decided that it is Section 101(a)(48)(A) rather than the FFOA that governs *federal* convictions, and if courts sustained that decision, there would be no basis for a claim that the FFOA must govern *state* convictions as a matter of equal protection.

There is, moreover, a substantial basis on which the BIA could determine that Section 101(a)(48)(A) governs federal convictions. As Judge Easterbrook has explained, that provision "affects only immigration matters; even if a disposition under [the FFOA] counts as a conviction in immigration law, it would not be a conviction for other purposes, such as firearms disabilities." *Gill* v. *Ashcroft*, 335 F.3d 574, 578 (7th Cir. 2003). Accordingly, Section 101(a)(48)(A) and the FFOA "may coexist, though the former reduces the domain of the latter." *Ibid*. See also *Madriz-Alvarado* v. *Ashcroft*, 383 F.3d 321, 331 n.12 (5th Cir. 2004) ("We have substantial doubt whether the FFOA controls over the subsequently enacted §1101(a)(48)(A).").

Second, even assuming that the FFOA would govern *federal* convictions, there is a rational basis for treating *state* convictions differently, and there is consequently no equal protection violation. As Judge Alito has explained, Congress was "[f]amiliar with the operation of the federal criminal justice system," and therefore "could have thought that aliens whose federal charges are dismissed under the FFOA are unlikely to present

a substantial threat of committing subsequent serious crimes." *Acosta* v. *Ashcroft*, 341 F.3d 218, 227 (3d Cir. 2003). In contrast, Congress may have been "unfamiliar with the operation of state schemes that resemble the FFOA," and therefore "could have worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what is considered a conviction under state law." *Ibid.* Particularly given Congress's broad "power in immigration matters," there "plain[ly]" is a rational basis for the distinction between federal and state convictions. *Ibid.* Accord *Resendiz-Alcaraz* v. *U.S. Attorney General*, 383 F.3d 1262, 1272 (11th Cir. 2004) (endorsing Judge Alito's reasoning); *Madriz-Alvarado*, 383 F.3d at 332 (same).

2. As noted above, the rule that petitioner challenges—that, in light of Section 101(a)(48)(A) of the INA, a state rehabilitative action that does not vacate a conviction on the merits or on a ground related to the violation of a statutory or constitutional right has no bearing on whether an alien has been "convicted" for immigration purposes—was adopted by the BIA in *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999). On petition for review, the BIA's decision in that case was vacated by the Ninth Circuit. *Lujan-Armendariz* v. *INS*, 222 F.3d 728 (2000). The court rejected the INS's argument that Section 101(a)(48)(A) "partially repeal[ed]" the FFOA, *id.* at 743, and then held that, "as a matter of constitutional equal protection," the benefits of the FFOA must be "extended to aliens whose offenses are expunged under state rehabilitative laws, provided that they would have been eligible for relief under the

[FFOA] had their offenses been prosecuted as federal crimes," *id.* at 749.

While the BIA is bound by *Lujan-Armendariz* in the Ninth Circuit, it has made clear that it will continue to apply *Roldan* elsewhere. *In re Salazar-Regino*, 23 I. & N. Dec. 223 (2002). And every other court of appeals to address the question has upheld the BIA's interpretation of Section 101(a)(48)(A). See *Resendiz-Alcaraz*, 383 F.3d at 1266-1272; *Madriz-Alvarado*, 383 F.3d at 330-336; *Acosta*, 341 F.3d at 222-227; *Gill*, 335 F.3d at 575-579; *Vasquez-Velezmoro* v. *INS*, 281 F.3d 693, 695-699 (8th Cir. 2002); *Herrera-Inirio* v. *INS*, 208 F.3d 299, 304-309 (1st Cir. 2000). Like the decision below, moreover, a number of those court of appeals decisions explicitly reject the equal protection claim that petitioner raises here. See *Resendiz-Alcaraz*, 383 F.3d at 1271-1272; *Madriz-Alvarado*, 383 F.3d at 332-334; *Acosta*, 341 F.3d at 224-227; *Vasquez-Velezmoro*, 281 F.3d at 695-699.

Petitioner asks this Court (Pet. 5-11) to resolve the conflict between those decisions and the Ninth Circuit's decision in *Lujan-Armendariz*. There is no need for the Court to resolve that conflict, however, and even if there were, this would not be an appropriate case in which to do so.

a. As an initial matter, the conflict can be eliminated without this Court's involvement. *Lujan-Armendariz* was the first case in which a court of appeals considered the equal protection claim that petitioner raises here. In the last four years, the Third, Fifth, Seventh, Eighth, and Eleventh Circuits have explicitly disagreed with the Ninth Circuit's decision in that case, see *Resendiz-Alcaraz*, 383 F.3d at 1271; *Madriz-Alvarado*, 383 F.3d at 332; *Acosta*, 341 F.3d at 225; *Gill*, 335 F.3d at 579;

Vasquez-Velezmoro, 281 F.3d at 697, and no circuit has followed it. In light of the subsequent decisions that have rejected *Lujan-Armendariz*, the Ninth Circuit may decide to reconsider the decision en banc.

While the BIA is bound by *Lujan-Armendariz* in cases arising in the Ninth Circuit, and there will therefore be no petitions for review in that circuit in which an alien challenges the rule adopted in *Roldan*, the Ninth Circuit would be in a position to grant hearing or rehearing en banc to consider whether to overrule *Lujan-Armendariz* in a case in which, for example, the alien petitions for review of a decision by the BIA that *Lujan-Armendariz* does not apply because the alien did not satisfy the requirements of the FFOA. Cf. Pet. 13 (citing cases in which the alien "could not meet the FFOA's requirements"). In addition, if the BIA or the Attorney General confronts the question in the future and concludes that the definition of "conviction" in Section 101(a)(48)(A) of the INA supersedes the FFOA in immigration proceedings, the BIA or the Attorney General could choose to apply that considered determination in the Ninth Circuit in order to present an occasion to seek reconsideration of that issue. If the en banc Ninth Circuit did overrule *Lujan-Armendariz*, the circuit conflict would be eliminated.

b. Even assuming that the issue were one that should be resolved by this Court, this would not be an appropriate case in which to do so. The IJ found petitioner removable, not only on the ground that he had been convicted of a drug offense, but also on the ground that he was in the United States without having been admitted or paroled. Pet. App. 16. The BIA and the court of appeals upheld the order of removal, and petitioner seeks this Court's review on only one of the two

grounds for removal. Since, as the court of appeals recognized, the fact that petitioner was not admitted or paroled is "enough in [itself] to support the order of removal" (*id.* at 9), a favorable decision by this Court would have no effect on the outcome of the case: the IJ's order of removal would still be upheld. Contrary to his assertion, therefore, petitioner would have been removed even "had his offense occurred within the Ninth Circuit" (Pet. 6), because, unlike the aliens in *Lujan-Armendariz*, petitioner was not a "legal resident," 222 F.3d at 732, 733, and there was thus an independent basis for his removal. This Court sits "to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

Petitioner denies that he would be removable even if this Court resolved in his favor the question presented in the petition. Pet. 12. He claims that (1) he "had an I-130 family petition approved for his benefit" in 1992; (2) he "possessed a valid social security number and proper employment verification documents"; and (3) "[h]is parents, wife, and child are all United States citizens." *Ibid.*[2] Petitioner cites nothing in the administrative record to support the second claim, however, and the only support he provides for the first and third claims are his own representations to the IJ. Pet. App. 28, 29. In any event, even if all of his claims are true, they do not alter the facts, the truth of which petitioner has never disputed, that demonstrate his removability on the first of the two grounds on which the IJ relied—namely, that he is not a national of the United States; that he is a native and citizen of Mexico; that he arrived in the United

[2] An "I-130 family petition" (Pet. 12) is a visa petition filed on behalf of an alien by a relative who is a lawful permanent resident. See 8 C.F.R. 204.2.

States at an unknown place and time; and that he was not admitted or paroled. *Id.* at 9. In that connection, petitioner's assertion that he has "had his status adjusted" (Pet. 12) is incorrect. As the court of appeals recognized, while petitioner may have *taken steps* to have his status adjusted, "[t]he immigration authorities ultimately denied his application for adjustment." Pet. App. 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

JANUARY 2006